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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted]/133

THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA, ET AL., *Petitioners,*

v.

HARVEY B. GANTT, a minor, by his father and next friend, Christopher Gantt, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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May 15, 1963.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners herein[1] pray that a writ of certiorari issue to review the judgment of the United States

[1] The petitioners include The Clemson Agricultural College of South Carolina; R. M. Cooper, President of the Board of Trustees of The Clemson Agricultural College of South Carolina; Edgar A. Brown, James F. Byrnes, Charles E. Daniel, Winchester Smith, Robert R. Coker, James C. Self, Paul Quattlebaum, Jr., W. Gordon McCabe, Jr., A. M. Quattlebaum and L. D. Holmes, Members of the Board of Trustees of The Clemson Agricultural College of South Carolina; and Kenneth N. Vickery, Registrar of The Clemson Agricultural College of South Carolina.

Court of Appeals for the Fourth Circuit entered in this case on January 16, 1963.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, entered on January 16, 1963, has not yet been reported. It is reprinted in Appendix A hereto, p. 1a, *infra*.

The opinion of the United States District Court for the Western District of South Carolina was issued and filed on December 21, 1962, and is reported at 213 F. Supp. 103. It is reprinted in Appendix B hereto, p. 7a, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 16, 1963. No petition for rehearing was filed. On April 3, 1963, the Chief Justice of the United States signed an order extending the time for filing this petition for writ of certiorari to and including May 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, under Rule 23(a)(3), Fed. Rules Civ. Proc., a class suit may be maintained and a class injunction issued where, in a suit claiming racial discrimination against a Negro applicant for admission to a state college, there is no proof of an identifiable class of other Negro applicants and where the highly individualized qualifications for college admission make a common question of law or fact impossible to formulate.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 23. Class Actions.

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

STATEMENT OF THE CASE

The respondent Gantt, through his father, filed this suit in the United States District Court for the Western District of South Carolina on July 7, 1962, under 28 U.S.C. § 1343(3). He alleged that he was a Negro citizen of the State of South Carolina, a high school graduate and therefore eligible to apply for admission to The Clemson Agricultural College of South Carolina. He further alleged that he was fully qualified for such admission, had filed the necessary applications and had met all the admission requirements, but had been denied admission "solely because of the race and color of plaintiff and pursuant to the policy, prac-

tice, custom and usage of limiting admissions to Clemson College to white persons only.". The denial of admission on that basis was said to violate rights "secured to him by the Constitution and laws of the United States" within the scope of 28 U.S.C. § 1343(3).[2] R. 1a-9a.

The complaint also stated that this was a class action brought on behalf of respondent Gantt and on behalf of "all other Negro residents in the State of South Carolina who are similarly affected and restricted by the policy, practice, custom and usage complained of herein." The members of this class were said to be so numerous as to make it impracticable to determine all of the members of the class and to bring them each individually before the court; there was said to be "a common question of law and fact involved in this case which affects the plaintiffs and all of the members of the class alike, and common relief is sought by the minor plaintiff for himself and for all members of the class." R. 3a-4a.

The complaint sought not only an order to admit the respondent Gantt to Clemson College for the school term beginning in September, 1962, but also an injunction enjoining "the policy, practice, custom and usage of excluding all qualified Negroes from Clemson College." R. 7a.

Simultaneously with the filing of the complaint, a preliminary injunction was sought to enjoin the officials

[2] Federal district courts are given original jurisdiction by 28 U.S.C. § 1343(3) over civil actions to redress the deprivation, under color of any state law, custom or usage, of any right, privilege or immunity secured by the Constitution or any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

of Clemson College from refusing to consider the applications of the respondent Gantt and other Negro residents of South Carolina for admission to Clemson College "upon the same terms and conditions applicable to white applicants seeking admission to said college." R. 10a. This injunctive request also went to what was described as the failure to act expeditiously upon applications received from Negro residents of South Carolina solely because of their race and color, and to the subjection of Gantt and other Negro applicants "to requirements, prerequisites, interviews, delays and tests not required of white applicants for admission." R. 10a.

An answer was duly filed by the petitioners herein. R. 15a-21a. All allegations as to discriminatory practices and denials of admission with respect to Negro applicants were denied. The answer further denied that respondent Gantt's application to transfer to Clemson College from Iowa State University had been denied, it being alleged that Gantt had failed to supply all the requested information that was necessary to process his application. A specific denial was made that this suit could properly be termed a class action "in that no other person, whose situation is similar to that of the Plaintiff, has applied for admission to Clemson College." R. 20a.

Following a hearing, the District Court denied the motion for a preliminary injunction. R. 191a-203a; 208 F. Supp. 416. The court was unable to find from the evidence submitted whether there had been any discriminatory action in the consideration of respondent Gantt's application, the record being barren as to the treatment accorded other like applications. The court did find, however, "that no application of the

plaintiff for enrollment as a student at Clemson College has been denied," one application having been properly cancelled and another being incomplete. R. 198a. With respect to the class action aspects of the preliminary injunction request, the court found, R. 196a, that

> . . . the record before me does not relate to any negro other than the plaintiff's application for admission to Clemson College. Plaintiff failed to develop through the deposition of the Registrar or the testimony of the President of the College any evidence that any other negro person is in a situation in any way similar to that of the plaintiff.

The order denying the motion for a preliminary injunction was appealed to the Court of Appeals for the Fourth Circuit. That court, on October 5, 1962, after hearing full argument, declined to disturb the District Court order on the assurance that the case on the merits would be expedited in the District Court. See pp. 2a, 7a-9a, *infra*.

The case then proceeded to a trial on the merits before the District Court, resulting in the opinion and judgment on December 21, 1962, dismissing the complaint. Appendix B hereto, p. 7a, *infra*. The court there concluded that the respondent Gantt had failed to prove the material allegations of his complaint, that he had failed to comply with the rules and regulations for admission to Clemson College, that he had failed to complete his application, that he had not been denied admission to Clemson College on any ground, and that he had not been denied admission to Clemson College on account of his race. More specifically, the court found that "At the time this action was commenced

Clemson College had not refused to admit plaintiff as a student to Clemson College on account of his race or on account of any other facts charged against the college." See p. 18a, *infra*. The detailed facts which led to that conclusion are stated at length in the opinion.

The District Court noted that, while the Legislature of South Carolina had indicated a policy of discouraging integration in state colleges, there is no statute now in existence which purports to make it illegal to admit respondent Gantt as a student at Clemson College. The court made it plain that if the evidence had demonstrated that respondent Gantt or any other Negro had made an application at Clemson and had met all the admission requirements "he could not legally be denied admission because of his race, and in such case it would be the duty of this court to order his admission." See p. 12a, *infra*. But, based upon the evidence as to the treatment accorded Gantt's application in comparison with that accorded other applications for admission, the court could find no discrimination against Gantt because of his race; nor could it find that his transfer application had been treated differently from those of about fifty white transfer applicants.[3]

The Court of Appeals reversed the order of the District Court and directed that the respondent Gantt be admitted to Clemson College "commencing with the opening of the next semester" since "his qualification for admission is unquestioned." The court found substantial evidence to support the District Court's finding that the cancellation of Gantt's first application

[3] The only exception related to the admission of a transfer student from the University of Florida, the evidence showing "that the college had good reason for her admission." See p. 19a, *infra*.

"was not discriminatory" and it further held that "the District Court was technically correct in holding that, at the time this action was commenced, Gantt's application had not been denied" but had simply not been "acted upon either way." Nevertheless, the Court of Appeals felt that under all the circumstances Gantt's second application should have been processed through to completion.

In so ruling, the Court of Appeals did not find that any of the requirements for admission by transfer to Clemson College were unreasonable, even when applied to Gantt. The court did note that the legislative policy of South Carolina discouraging racial integration in its schools was "unacceptable" under the Constitution of the United States, a factor which the court felt gave Gantt reason to believe that his effort to transfer to Clemson College might be unavailing without instituting legal proceedings. But the court did not find that this "unacceptable" policy underlay the actions of the Clemson College officials in this instance. It merely said that the suspension of the processing of the application could not be justified by the institution of this suit by Gantt, motivated as it was by Gantt's belief as to its necessity.

The Court of Appeals further held that this was a class action and that the District Court erred in failing to grant appropriate injunctive relief in light thereof. In the words of the court, p. 6a, *infra*:

> The action was brought by the plaintiff not only for his own benefit, but on behalf of other Negro citizens of South Carolina similarly situated. This procedure is entirely proper under Rule 23(a)(3) of the Federal Rules of Civil Procedure. Other Negroes have in the past sought admission to

> Clemson, and doubtless there are other qualified Negroes who will do so. These, as well as Gantt, are entitled to freedom from a racially discriminatory policy.

No mention was made by the Court of Appeals of the earlier determination of the District Court, R. 196a, that Gantt's evidence had failed to establish that any other Negro "is in a situation in any way similar to that of the plaintiff."

Subsequent to the entry of the Court of Appeals judgment, the respondent Gantt has in fact been admitted to Clemson College in compliance with the injunctive decree. The class action injunction remains outstanding.

REASONS FOR GRANTING THE WRIT

The decision below as to the availability and propriety of class action relief in this type of proceeding raises important and unresolved issues meriting plenary review by this Court. The absence of any meaningful guidelines in Federal Civil Rule 23(a)(3) for dealing with these problems in the context of racial discrimination suits has led to differing results in the lower federal courts. Indeed, the difficulties inherent in this situation have created direct conflicts between the decision below and applicable decisions of this Court and of at least one other federal appellate tribunal.

A. Defining the Class

The Court of Appeals below defined the class in the conclusionary words of the complaint—"other Negro citizens of South Carolina similarly situated." But the court did not purport to overrule the determination of the District Court, R. 196a, that the evidence

failed to establish that any other Negro in South Carolina "is in a situation in any way similar to that of the plaintiff." There was no determination that such finding was clearly erroneous in the light of proof that other Negroes in South Carolina had in fact been qualified and had sought admission to Clemson College. No such proof existed. Nor was there any evidence whatever that other qualified Negroes "doubtless" will make application to Clemson College in the future.

In the absence of proof of applications by other qualified Negroes resident in South Carolina, a substantial question is raised as to the existence of a identifiable class for purposes of class relief. This Court recently made plain that where the existence of a class depends upon some type of action that associates a person with the class, such action is not to be presumed; it must be demonstrated by proof. In *International Association of Machinists* v. *Street*, 367 U.S. 740, 774 (1961), a class action suit had been brought on behalf of all employees who objected to a union shop assessment devoted to political purposes. A class action was held to be improper "for there is no attempt to prove the existence of a class of workers who had specifically objected to the exaction of dues for political purposes. See *Hansberry* v. *Lee*, 311 U.S. 32, 44." This Court concluded, 367 U.S. at 774, "that only those who have identified themselves as opposed to political use of their funds are entitled to relief in this action." See also *Scott* v. *Donald*, 165 U.S. 107, 115 (1897). As applied to the instant case, the *Street* doctrine means that only those Negroes in South Carolina who have identified themselves as fully qualified for admission to Clemson College are entitled to relief in this action. No such identification having been

proved, the class injunction must fail. See *Brotherhood of Clerks* v. *Allen*, No. 316, Oct. Term 1962, slip opinion, pp. 2, 3, 5, especially footnote 4 (May 13, 1963), where the *Street* doctrine as to class actions was reaffirmed and applied.

The determination below that class relief is proper despite the absence of an attempt to prove the existence of a class of Negro applicants qualified to enter Clemson College is thus in clear conflict with the principle announced in the *Street* case. The fact that compliance with college entrance qualifications is so highly an individual matter, as the particular facts in this case demonstrate, only heightens the difficulty of defining the class. Proof, not assumptions, is all the more necessary in making that definition.

B. Defining the Common Question

To justify relief in favor of a definable class, Rule 23(a)(3) calls for "a common question of law or fact affecting the several rights" of the given class. The heart of the problem in racial discrimination class suits concerns the existence of such a common question. That common question may be difficult to identify in light of the personal nature that attaches to many of our constitutional rights. See *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 351 (1938); *Sweatt* v. *Painter*, 339 U.S. 629, 635 (1950); *Brown* v. *Board of Trustees*, 187 F. 2d 20, 25 (C.A. 5, 1951).

As stated in 2 Barron & Holtzoff, Federal Practice and Procedure, § 562.1, pp. 268-270 (Wright ed. 1961), "The availability of class actions in matters involving racial discrimination has led to some difficulty" and has created a distinction "between cases challenging a policy discriminatory against an entire group and

cases in which it is claimed that a policy, nondiscriminatory on its face, has been applied in a discriminatory manner to a particular individual or individuals." In the latter type of cases, class action is generally considered improper.

Thus where the suit challenges the validity of a state statute or policy that on its face discriminates against an entire group on the basis of race or color, the common question seems clear and the propriety of a class action is indisputable. Such a statute or policy defines both the class and the common question. See, e.g., *Evers* v. *Dwyer*, 358 U.S. 202 (1958); *Sharp* v. *Lucky*, 252 F. 2d 910 (C.A. 5, 1958).[4]

But where state policies are challenged which are not on their face discriminatory but may have been applied to the plaintiff in a discriminatory manner, more difficult problems are presented. Can the right of the individual plaintiff to be free of discriminatory application of a nondiscriminatory policy be merged into the more general right of a class? Does the common question relate to the nondiscriminatory policy or to its potential application to individuals on a discriminatory basis?

It is within this difficult area that the instant case falls. What started out in the complaint as a general challenge to the validity of an undefined state policy barring admission of all Negroes to Clemson College

[4] In the *Evers* case, a Tennessee statute requiring segregated seating in public transportation adequately defined the racial class for purposes of a class suit. In *Sharp* v. *Lucky*, the action of a voting registrar in refusing to deal with a Negro lawyer in a public room or office because of his color in itself defined the class as all having "an identity of interest in having access to the public offices of the Parish on a non-segregated basis." 252 F. 2d at 913.

has been limited by the proof and by judicial decision to nothing more than a legitimate objection to a discriminatory application of reasonable admission requirements of Clemson College. Such discriminatory application was not found to reflect any general anti-Negro policy of South Carolina; the state policy discouraging integration which the Court of Appeals held to be "unacceptable" related only to the justification of Gantt's belief in the need for institution of this suit, not to the actions of the Clemson College officials. The Court of Appeals ordered Gantt admitted to Clemson College only because it found that under all the highly individualized circumstances Gantt was fully qualified and no legitimate reason existed for not processing his application through to completion.

In such a context, a class action with class relief seems highly improper. What justified Gantt's admission to Clemson College were his own individual qualifications, matters which are necessarily unique to him and foreign to any one else. There was no "common question of law or fact" which justifies the admission of Gantt as well as of all other Negro applicants in South Carolina. Individual qualifications remain decisive.

Thus emerges a direct conflict between the decision below and that of the Fifth Circuit in *Reddix* v. *Lucky*, 252 F. 2d 930, 938 (1958).[5] In *Reddix* the court held a class action improper to challenge the action of a registrar in striking many Negroes from the voting lists as illegally registered, since the right of each voter would depend upon the actions taken with regard to

[5] The decision in the *Reddix* case was made by the same court, and on the same day, that rendered the decision in *Sharp* v. *Lucky*, see footnote 4, *supra*.

his particular case. "The fact that each voter must allege and prove the circumstances that might add up to an illegal purge," said the court, "makes it inappropriate, if not impossible, for a single plaintiff to represent them in a class action." And so in the instant case, the fact that each Negro applicant to Clemson College must allege and prove his own qualifications and the circumstances adding up to a discriminatory denial of admission "makes it inappropriate, if not impossible, for a single plaintiff to represent them in a class action." These two decisions, in short, are irreconcilable.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 15, 1963.